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November 5, 2008

By e-filing

Anne K. Quinlan, Esq.  
Acting Secretary  
Surface Transportation Board  
395 E Street, S.W., Suite 1149  
Washington, DC 20024

Re. Finance Docket No. 35133, *Milwaukee Industrial Trade Center, LLC, d b a Milwaukee Terminal Railway -- Acquisition and Operation Exemption -- Line Owned By Milwaukee Industrial Trade Center, LLC, d b a Milwaukee Terminal Railway*

Dear Ms. Quinlan

Hereby transmitted is a Reply In Opposition To Petition For Leave To File A Reply To A Reply for filing with the Board in the above referenced matter.

Very truly yours,

*Tom McFarland*

Thomas F. McFarland  
*Attorney for Applicant*

*1McF kl enc wp8 0\1294-A\efsth2*

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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MILWAUKEE INDUSTRIAL TRADE	)	
CENTER, LLC, d b a MILWAUKEE	)	
TERMINAL RAILWAY -- ACQUISITION	)	
AND OPERATION EXEMPTION -- LINE	)	FINANCE DOCKET
OWNED BY MILWAUKEE INDUSTRIAL	)	NO 35133
TRADE CENTER, LLC, d b a	)	
MILWAUKEE TERMINAL RAILWAY	)	

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REPLY IN OPPOSITION TO PETITION  
FOR LEAVE TO FILE A REPLY TO A REPLY

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MILWAUKEE INDUSTRIAL TRADE CENTER, LLC  
d b a MILWAUKEE TERMINAL RAILWAY  
4777 West Lincoln Ave.  
West Milwaukee, WI 53219

Applicant

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Attorney for Applicant

DUE DATE: November 5, 2008

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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MILWAUKEE INDUSTRIAL TRADE	)	
CENTER, LLC, d b a MILWAUKEE	)	
TERMINAL RAILWAY -- ACQUISITION	)	
AND OPERATION EXEMPTION -- LINE	)	FINANCE DOCKET
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TRADE CENTER, LLC, d.b a	)	
MILWAUKEE TERMINAL RAILWAY	)	

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**REPLY IN OPPOSITION TO PETITION  
FOR LEAVE TO FILE A REPLY TO A REPLY**

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Pursuant to 49 C F R. § 1104.13(a), MILWAUKEE INDUSTRIAL TRADE CENTER, LLC, d b a. MILWAUKEE TERMINAL RAILWAY ("MITC"), hereby replies in opposition to a Petition For Leave To File A Reply To A Reply (Petition), filed by the REDEVELOPMENT AUTHORITY FOR THE CITY OF MILWAUKEE, WISCONSIN ("RACM") on October 16, 2008

**BACKGROUND**

On September 18, 2008, RACM filed a Petition to Revoke an exemption from 49 U.S.C § 10901 that had become effective more than three months earlier for MITC's acquisition and operation of approximately two miles of rail line located within 84 acres of land owned by MITC at Milwaukee, WI.

On October 6, 2008, MITC filed a Reply in Opposition to RACM's Petition to Revoke the exemption

RACM's Petition For Leave To File A Reply To A Reply is directed at that MITC Reply  
RACM tendered such a Reply along with its Petition For Leave To File.

### **REPLY**

It is succinctly provided in 49 C.F.R. § 1104 13(c) as follows

A reply to a reply is not permitted

RACM argues that "the Board has discretion to accept such a pleading where it contains material that adds to the Board's understanding of the issues." (Petition at 1)

On the contrary, there is no such nebulous principle. The Board saw through a similar contention in granting a motion to strike a reply to a reply in *CSX Corp. -- Control -- Chessie System, Inc et al.*, 2 S T B 554 (1997), at 557, viz (emphasis added)

... CSX expresses a desire for a 'more complete discussion of the issues raised in TCU's reply.' But this is merely an attempt to have the last word in pleading ...

RACM's Petition does not cite any purported authority for the proposition that a reply to a reply is to be accepted when the reply would "add ( ) to the Board's understanding of the issues" (Petition at 1). On the contrary, there is extensive authority that the explicit prohibition of a reply to a reply in 49 C F R § 1104 13(c) is to be enforced as written, e.g.

- (1) *CSX Corp -- Control -- Chessie System, Inc., et al , supra*;
- (2) *Buffalo Ridge RR, Inc - Aban Bet Manley, MN and Brandon, SD*, 9 I C C.2d 544, 545, n 2 (1993),
- (3) *St Louis Southwestern Ry. Co. Compensation - Trackage Rights*, 4 I C.C. 2d 668, 673 (1987),

- (4) *Louisville & Jefferson Co. & CSX Const & Oper ,Jeff., KY*, 4 I C.C 2d 749, 750 (1988),
- (5) *Louisville and Nashville R. Co Abandonment*, 366 I.C C 1, 5-6 (1981), and
- (6) *Missouri Pac R. Co. - Merger - T&P and CE&I*, 360 I C C 565 (1979)

RACM's Petition does not contain a showing of good cause for filing a reply to MITC's Reply RACM contends that its reply responds to issues raised in MITC's Reply that were not addressed in RACM's Petition to Revoke, such as "MITC's assertion that its filing promotes the rail transportation policy of 49 U S C § 10101 " (Petition at 1).

MITC's Reply argued that RACM's Petition to Revoke failed to establish (or even argue) that application of 49 U S C § 10901 to MITC's rail line acquisition and operation is necessary to carry out the transportation policy of 49 U S C. § 10101, as required by 49 U S C § 10502(d) before an exemption can be revoked. (MITC Reply in Opposition to Petition to Revoke, at 6) Clearly, that was not an assertion that MITC's acquisition and operation of the rail line promotes the rail transportation policy, as alleged by RACM. Instead, it was an assertion that RACM's Petition to Revoke MITC's exemption failed to contain an essential element of any petition to revoke, i.e., a showing that regulation of the transaction is necessary to carry out the rail transportation policy (See 49 U.S.C. § 10502[d]) A showing that RACM failed to sustain its statutory burden of proof surely does not open the door for RACM to attempt again to sustain that burden of proof in a reply to reply

RACM's Petition argues more generally that its reply to MITC's Reply "provides further detail into the false and misleading nature of MITC's exemption," and "rebutts inaccuracies contained in MITC's Reply" (Petition at 1-2) But further detail from RACM is the last thing

required in this record after the filing of hundreds of pages in RACM's Petition to Revoke the exemption. And if a general claim of rebutting alleged inaccuracies in a reply were a valid basis for filing a reply to a reply, that would swallow up the rule against filing a reply to a reply. As was stated in *Louisville & Jefferson Co. & CSX Const. & Oper., Jeff., KY, supra*, 4 I.C.C. 2d at 750, the rule against filing a reply to a reply "is designed to assure a predictable and orderly end to the filing of pleadings." It follows that neither ground argued by RACM constitutes good cause for filing a reply to a reply.

It follows from the foregoing that RACM's reply to MITC's Reply should be rejected. MITC will not burden this record with yet another reply in the nature of surrebuttal to the purported rebuttal contained in RACM's tendered reply. There surely is ample evidence and argument in RACM's Petition to Revoke the exemption and in MITC's Reply in Opposition to that Petition to allow the Board to make a reasoned decision on the merits of the issue of revocation of MITC's exemption. RACM's tendered reply would add nothing of substance to that adequate record.

**CONCLUSION AND REQUESTED RELIEF**

WHEREFORE, for the reasons stated, (1) RACM's Petition for Leave to File a Reply to a Reply should be denied, and (2) the reply tendered by RACM should be rejected

Respectfully submitted,

MILWAUKEE INDUSTRIAL TRADE CENTER, LLC  
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4777 West Lincoln Ave.  
West Milwaukee, WI 53219

Applicant

*Thomas F McFarland*

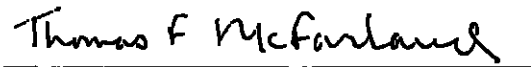
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Attorney for Applicant

DUE DATE: November 5, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that on November 5, 2008, I served a copy of the foregoing document, Reply In Opposition To Petition For Leave To File A Reply To A Reply, by e-mail & first-class, U S mail, postage prepaid, on Robert P vom Eigen, Esq , *rvomeigen@foley.com*, Sarah A Key, Esq., *skey@foley.com*, Deborah A Wells, *dawells@foley.com*, Foley & Lardner, LLP, 3000 K Street, N W , Washington, DC 20007, and on Thomas O Gartner, Esq , Gregg C Hagopian, Esq., Assistant City Attorneys, Milwaukee City Hall, 200 E Wells Street, Suite 800, Milwaukee, WI 53202, by first-class, U.S. mail, postage prepaid

  
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Thomas F. McFarland